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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 JOSEPH C. SISNEROS,
12 CDCR #F-17317,

Plaintiff,

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14 vs.

15 D. BROWN, Sergeant; D. MENDEZ,
16 Correctional Officer; J. DAVIS,
17 Psychiatrist; S. KRITTMAN,
Psychologist,

Defendants.
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Case No.: 14cv0891 GPC (RBB)

ORDER:

**(1) GRANTING DEFENDANT DAVIS
AND KRITTMAN’S MOTION TO
DISMISS PURSUANT TO
Fed. R. Civ. P. 12(b)(6)
[Doc. No. 10]**

AND

**(2) GRANTING DEFENDANT
BROWN AND MENDEZ’S MOTION
FOR SUMMARY JUDGMENT
PURSUANT TO Fed. R. Civ. P. 56
AND 42 U.S.C. § 1997e(a)
[Doc. No. 9]**

23 Joseph C. Sisneros (“Plaintiff”), is a prisoner currently incarcerated at the
24 California Health Care Facility (“CHCF”) in Stockton, California, and is proceeding pro
25 se and in this civil action pursuant to 42 U.S.C. § 1983. Defendants are all correctional
26 and medical officials employed at Richard J. Donovan Correctional Facility (“RJD”)
27 where Plaintiff was incarcerated in September and November 2013. *See* Compl., Doc.
28

No. 1, at 1-2. Plaintiff claims Defendants acted with deliberate indifference to his safety in violation of the Eighth Amendment by failing to protect him from being attacked by his cellmate. *Id.* at 3-4. He seeks \$49,000 in both general and punitive damages. *Id.* at 6.

I. Procedural History

Defendants Davis and Kritzman have filed a Motion to Dismiss Plaintiff's Complaint for failure to state a claim pursuant to FED. R. CIV. P. 12(b)(6) (Doc. No. 10). Defendants Brown and Mendez have filed a Motion for Summary Judgment pursuant to FED. R. CIV. P. 56 based on Plaintiff's failure to properly exhaust available administrative remedies prior to suit, as is required by 42 U.S.C. § 1997e(a) (Doc. No. 9). In response to the Court's Notice to Plaintiff of Defendants' Motion for Summary Judgment (Doc. No. 12), Plaintiff has filed an Opposition (Doc. No. 14), as well as several additional supplemental oppositions, exhibits, and other miscellaneous documents (Doc. Nos. 18, 20, 22, 29). In response to Plaintiff's original Opposition, Defendants have filed a Reply (Doc. No. 16).

After careful review of both Motions, as well as all evidence submitted both by Defendants in support of summary judgment and Plaintiff in response, the Court GRANTS both Defendant Davis & Kritzman's Motion to Dismiss Plaintiff's Complaint for failing to state a claim, and Defendant Brown and Mendez's Motion for Summary Judgment based on Plaintiff's failure to exhaust his administrative remedies for the reasons set out below.

II. Factual Allegations

Plaintiff is "70 years old," weighs "168 pounds," and suffers from "three life-threatening diseases—diabetes, hypertension & the Hep. C virus." Compl. at 3. "A few days" or "about one week" before September 10, 2013, Plaintiff was assigned a cellmate named Gomez, whom Plaintiff describes as "loud & obnoxious," "43 years old at 200+ lbs. & as crazy as they come." *Id.* This "first time," Plaintiff contends he "got rid of Mr. Gomez" by explaining his "bizarre, erratic & crazy behavior" and "the big differences between them," to Defendant Mendez, a Correctional Officer. *Id.* at 3, 7. Plaintiff claims

1 Gomez “looked dangerous” and he “didn’t want to deal with [him].” *Id.* at 3. Mendez
2 “agreed, and moved Mr. Gomez out.” *Id.* at 7.

3 On September 10, 2013, Gomez was “moved back with [Plaintiff]” for a “second
4 and final time.” *Id.* at 3-4. Plaintiff “objected & complained,” but Mendez told him he
5 “had no choice,” because “Sergeant Brown ok[ayed] the move.” *Id.* at 3. Plaintiff
6 “believes” that neither Mendez nor Brown “bothered to check the master file, or the
7 I.S.R.S. file¹ on Mr. Gomez[’s] psychological evaluation” before placing him with
8 Plaintiff. *Id.* at 7.

9 After Gomez moved in, Plaintiff claims he initially helped Gomez with “his
10 laundry, and [his] store,” and “protected him from other inmates trying to take advantage
11 of him.” *Id.* at 4. Plaintiff also assisted Gomez by “reading and writing” letters from his
12 mother and sister, which is “how [he] found out that Mr. Gomez should be on psych.
13 meds.” *Id.*

14 Plaintiff claims that on November 8, 2013, he “talked to Dr. Davis—the prison
15 psychiatrist,” “explained” Gomez’s “bizarre and crazy behavior,” and told him that
16 “according to [Gomez’s] mom,” Gomez needed medication. *Id.* Davis replied that
17 Gomez “had to go through his clinician[,] Dr. Kritzman.” *Id.* One or two weeks before
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20 ¹ The Institutional Staff Recommendation Summary (ISRS) is part of an inmate’s
21 Cumulative Case Summary, and is prepared for each inmate committed or returned to the
22 custody of the CDCR as a parole violator with a new life term. *See* CAL. CODE REGS., tit.
23 15 § 3075.1(a)(6), (h) (Jan. 1, 2015). “The ISRS shall state the sources of information used
24 and summarize the inmate’s history of or status concerning: type of confidential
25 information on file; holds or detainers; medical and dental requirements or limitations;
26 results of a psychiatric or psychological referral; work experiences and skills; narcotics,
27 drugs and alcohol use; escapes; arson offenses; sex-related offenses; academic and Career
28 Technical Education program needs or interests; necessary casework follow-up; the
counselor’s evaluation of the inmate; release plans if the inmate has six months or less to
release; Reentry Hub eligibility; classification score and custody designation suffix;
community correctional facility eligibility; and recommended facility placement.” *Id.*
§ 3075.1(h)(1).

1 November 10, 2013, Plaintiff contends both Drs. Kritzman and Davis “had a one on one
2 with inmate Gomez,” but “nothing was done.” *Id.*

3 On November 10, 2013, Plaintiff claims Gomez “almost took [his] life because
4 [Plaintiff] asked Gomez politely” to lower the volume on the TV. *Id.* Plaintiff claims
5 Gomez “bushwacked [him],” by “pummeling [him] on the head, face & torso,” biting his
6 cheek, stabbing him on the head and face with his eyeglasses, spitting in his ear and face,
7 and kicking him in the ribs, kidneys and shins. *Id.* at 3. Plaintiff claims “the whole ordeal
8 lasted about one hour.” *Id.* at 3. Plaintiff claims Gomez was able to “pin[] [him] down
9 real good,” and was able to “severely beat [him] almost to the point of death,” because
10 Plaintiff’s “medical problems, one bad arm,” hypoglycemia, and dizzy spells rendered
11 him “defenseless.” *Id.* at 4, 7.

12 **III. Defendant Davis and Kritzman’s Motion to Dismiss**

13 Both Drs. Davis and Kritzman move to dismiss Plaintiff’s Complaint against them
14 pursuant to FED. R. CIV. P. 12(b)(6) on grounds that he has failed to “allege facts
15 necessary to support a claim of deliberate indifference to his safety,” and because they
16 are entitled to qualified immunity. *See* Defs.’ Mem. of P&As in Supp. of Mot. to Dismiss
17 (Doc. No. 10-1) at 4-8.

18 **A. Standard of Review**

19 A Rule 12(b)(6) dismissal may be based on either a “‘lack of a cognizable legal
20 theory’ or ‘the absence of sufficient facts alleged under a cognizable legal theory.’”
21 *Johnson v. Riverside Healthcare System, LP*, 534 F.3d 1116, 1121-22 (9th Cir. 2008)
22 (quoting *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990)).

23 “To survive a motion to dismiss, a complaint must contain sufficient factual
24 matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft*
25 *v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544,
26 570 (2007)). “A claim has facial plausibility when the plaintiff pleads factual content that
27 allows the court to draw the reasonable inference that the defendant is liable for the
28 misconduct alleged.” *Id.* at 679 (citing *Twombly*, 550 U.S. at 556). “Threadbare recitals

1 of the elements of a cause of action, supported by mere conclusory statements, do not
 2 suffice.” *Iqbal*, 556 U.S. at 678; *Twombly*, 550 U.S. at 555 (on motion to dismiss court is
 3 “not bound to accept as true a legal conclusion couched as a factual allegation.”). “The
 4 pleading standard ... does not require ‘detailed factual allegations,’ but it demands more
 5 than an unadorned, the defendant-unlawfully-harmed-me accusation.” *Iqbal*, 556 U.S. at
 6 678 (citations omitted).

7 In analyzing a pleading, the Court sets conclusory factual allegations aside, accepts
 8 all non-conclusory factual allegations as true, and determines whether those non-
 9 conclusory factual allegations accepted as true state a claim for relief that is plausible on
 10 its face. *Iqbal*, 556 U.S. at 676-684; *Turner v. City & Cty. of San Francisco*, __ F.3d __,
 11 2015 WL 3619888 at *3 (9th Cir. 2015) (noting that “conclusory allegations of law and
 12 unwarranted inferences are insufficient to avoid a Rule 12(b)(6) dismissal.”) (internal
 13 quotation marks and citation omitted). And while “[t]he plausibility standard is not akin
 14 to a probability requirement,” it does “ask[] for more than a sheer possibility that a
 15 defendant has acted unlawfully.” *Iqbal*, 556 U.S. at 678 (internal quotation marks and
 16 citation omitted). In determining plausibility, the Court is permitted “to draw on its
 17 judicial experience and common sense.” *Id.* at 679.

18 Nevertheless, claims asserted by pro se petitioners, “however inartfully pleaded,”
 19 are held “to less stringent standards than formal pleadings drafted by lawyers.” *Haines v.*
 20 *Kerner*, 404 U.S. 519-20 (1972). Thus, courts “continue to construe pro se filings
 21 liberally when evaluating them under *Iqbal*.” *Hebbe v. Pliler*, 627 F.3d 338, 342 & n.7
 22 (9th Cir. 2010) (citing *Bretz v. Kelman*, 773 F.2d 1026, 1027 n.1 (9th Cir. 1985) (noting
 23 that courts “have an obligation where the petitioner is *pro se*, particularly in civil rights
 24 cases, to construe the pleadings liberally and to afford the petitioner the benefit of any
 25 doubt.”)).

26 **B. Eighth Amendment Failure to Protect Claims**

27 The Eighth Amendment requires prison officials to “take reasonable measures to
 28 guarantee the safety of the inmates.” *Hudson v. Palmer*, 468 U.S. 517, 526-27 (1984);

1 *DeShaney v. Winnebago County Dep't of Social Services*, 489 U.S. 189, 199-200 (1989)
 2 (“[W]hen the State takes a person into its custody and holds him there against his will,
 3 the Constitution imposes upon it a corresponding duty to assume some responsibility for
 4 his safety and general well-being.”). In fact, the Supreme Court has specifically held that
 5 this duty requires officials to protect prisoners from violence at the hands of other
 6 prisoners. *Farmer v. Brennan*, 511 U.S. 825, 833 (1994) (citations omitted); *Hearns v.*
 7 *Terhune*, 413 F.3d 1036, 1040 (9th Cir. 2005).

8 However, “[p]rotecting the safety of prisoners and staff involves difficult choices
 9 and evades easy solutions.” *Berg v. Kincheloe*, 794 F.2d 457, 460 (9th Cir. 1986). Thus,
 10 in order to state a cruel and unusual punishment claim based on a prison official’s failure
 11 to protect him, Plaintiff must first allege facts sufficient to show that the risk he faced
 12 was objectively “sufficiently serious,” *i.e.*, that the conditions under which he was
 13 confined posed a “substantial risk of serious harm” to him. *Farmer*, 511 U.S. at 834;
 14 *Cortez v. Skol*, 776 F.3d 1046, 1050 (9th Cir. 2015). Second, because “only the
 15 unnecessary and wanton infliction of pain implicates the Eighth Amendment,” Plaintiff’s
 16 pleading must also contain “factual content that allows the court to draw the reasonable
 17 inference,” *Iqbal*, 556 U.S. at 678, that each individual defendant he seeks to hold liable
 18 acted with a “sufficiently culpable state of mind.” *Wilson*, 501 U.S. at 297 (internal
 19 quotation marks, emphasis and citations omitted); *see also Hudson*, 503 U.S. at 5, 8.

20 In a failure to protect case, “that state of mind is one of ‘deliberate indifference’ to
 21 inmate health or safety.” *Farmer*, 511 U.S. at 834. Prison officials display a deliberate
 22 indifference to an inmate’s well-being only when they know of and consciously disregard
 23 a substantial risk of harm to his health or safety. *Farmer*, 511 U.S. at 837. “[T]he official
 24 must both be aware of facts from which the inference could be drawn that a substantial
 25 risk of serious harm exists, and he must also draw the inference.” *Id.*; *see also Taylor v.*
 26 *Barkes*, ___ U.S. ___, 135 S. Ct. 2042, 2045 (2015) (noting that *Farmer* holds that “Eighth
 27 Amendment liability requires actual awareness of risk.”). This “subjective approach”
 28 focuses only “on what a defendant’s mental attitude actually was,” *Farmer*, 511 U.S. at

839, and “is a high legal standard.” *Toguchi v. Chung*, 391 F.3d 1051, 1060 (9th Cir. 2004).

Thus, if prison officials “did not know of the underlying facts indicating a sufficiently substantial danger,” and “were therefore unaware of the danger,” or if “they knew the underlying facts but believed (albeit unsoundly) that the risk to which the facts gave rise was unsubstantial or nonexistent,” they may not be held liable. *Farmer*, 511 U.S. at 844; *see also Gibson v. County of Washoe, Nevada*, 290 F.3d 1175, 1188 (9th Cir. 2002) (noting that a prison official who “should have been aware of the risk, but was not, ... has not violated the Eighth Amendment, no matter how severe the risk.”).

Moreover, the deliberate indifference standard requires that even if a prison official is alleged to have “actually kn[own] of a substantial risk to [Plaintiff’s] health or safety[,] [he] may be found free from liability if [he] responded reasonably to the risk, even if the harm was not ultimately averted.” *Farmer*, 511 U.S. at 844. Deliberate indifference is, therefore, “‘something more than mere negligence,’ but ‘something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result.’” *Cortez*, 776 F.3d at 1050 (quoting *Farmer*, 511 U.S. at 835).

Thus, in order to state a plausible claim for relief against Drs. Davis and Kritzman, Plaintiff’s Complaint must include enough “factual content that allows the court to draw the reasonable inference” *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 556), that both Davis and Kritzman actually *knew* his cellmate, Gomez, posed an objectively serious risk to his safety or health, “inferred that substantial harm might result from the risk,” and then failed to take reasonable action to abate it. *See Wallis v. Baldwin*, 70 F.3d 1074, 1077 (9th Cir. 1995). As currently pleaded, the Court finds Plaintiff’s Complaint fails to allege a plausible claim for relief under the Eighth Amendment against either Dr. Kritzman or Dr. Davis because he has failed to include sufficient “factual enhancement” from which the Court may reasonably infer that either of them acted, or failed to reasonably act, under circumstances which presented a “substantial” or “obvious risk of “imminent” harm to him. *See Iqbal*, 556 U.S. at 678; *Baze v. Rees*, 553 U.S. 35, 50

1 (2008) (to be deliberately indifferent, a prison official must fail to reasonably act under
 2 circumstances which are “‘sure or very likely to cause serious . . . and needless
 3 suffering’” and which “‘give rise to ‘sufficiently imminent dangers.’” (quoting *Helling v.*
 4 *McKinney*, 509 U.S. 25, 33-35 (1993)).

5 First, Plaintiff claims that while he “talked to Dr. Davis” on November 8, 2013
 6 about Gomez’s “bizarre and crazy behavior,” and mentioned Gomez’s mother’s belief
 7 that her son “should be on psych meds,” *see* Compl. at 4, he pleads no further factual
 8 allegations to show that Davis knew, based on this conversation alone, that he faced a
 9 “substantial risk” of serious harm if Gomez were not medicated or assigned to another
 10 cell; nor does Plaintiff allege any additional facts from which the Court might reasonable
 11 infer that Davis consciously disregarded any risk that was “obvious.” *Farmer*, 511 U.S. at
 12 842; *Cortez*, 776 F.3d at 1050. In fact, Plaintiff admits Dr. Davis did not simply ignore
 13 his concerns, but instead took *some* action when he recommended to Plaintiff that Gomez
 14 consult with his clinician, Dr. Krittman, and then met “one on one” with Gomez
 15 approximately two weeks before Plaintiff was attacked. *See* Compl. at 4; *Farmer*, 511
 16 U.S. at 844 (defendant is not liable “if [he] responded reasonably to the risk, even if the
 17 harm was not ultimately averted.”). Moreover, Plaintiff does not allege Gomez made any
 18 threats against him in Davis’s presence during their meeting, and does not proffer any
 19 other facts from which the Court might reasonably infer how or why Davis might have
 20 actually “drawn the inference” that Plaintiff faced a substantial risk of harm simply
 21 because he shared a cell with Gomez. *Farmer*, 511 U.S. at 837 (“[T]he official must both
 22 be aware of facts from which the inference could be drawn that a substantial risk of
 23 serious harm exists, and he must also draw the inference.”); *see also Taylor*, __ U.S. at
 24 __, 135 S. Ct. at 2045 (“Eighth Amendment liability requires actual awareness of risk.”).

25 Even assuming Plaintiff’s conversation with Davis on November 8, 2013, provided
 26 Davis with information consistent with a potential for harm, a “mere suspicion” without
 27 more is insufficient to show deliberate indifference. *Berg*, 794 F.2d at 459 (deliberate
 28 indifference “does not require that the guard or official ‘believe to a moral certainty that

1 one inmate intends to attack another at a given place at a time,” but “he must have more
 2 than a mere suspicion that an attack will occur.”) (citations omitted); *see also Labatad v.*
 3 *Corr. Corp. of Am.*, 714 F.3d 1155, 1161 (9th Cir. 2013) (finding summary judgment
 4 proper as to prisoner’s Eighth Amendment claim where only evidence offered to
 5 demonstrate deliberate indifference was defendants’ knowledge that plaintiff fought three
 6 days prior to his cellmate’s attack with a member of his cellmate’s gang); *Johnson v.*
 7 *Hicks*, No. 1:11-CV-02162-GSA-PC, 2014 WL 1577280, at *5 (E.D. Cal. Apr. 17, 2014)
 8 (finding prisoner failed to sufficiently allege Eighth Amendment failure to protect claim
 9 where he claimed attacker was “in Ad-Seg for disciplinary reasons,” and was “well
 10 known for in-cell violence,” but failed to claim any defendant knew his attacker “posed a
 11 particular, present danger” to him).

12 Plaintiff’s claims as to Dr. Kritzman are even less availing. Specifically, Plaintiff
 13 alleges only that Davis told him Kritzman was Gomez’s clinician, and that Kritzman, like
 14 Davis, had a “one on one” with Gomez “about one week before he assaulted [Plaintiff].”
 15 Compl. at 4. Plaintiff offers no “further factual enhancement” as to Dr. Kritzman or any
 16 role he may have played in causing Plaintiff’s injury. *Twombly*, 550 U.S. at 557; *Iqbal*,
 17 556 U.S. at 677 (“[E]ach Government official, his or her title notwithstanding, is only
 18 liable for his or her own misconduct.”); *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir.
 19 1978) (a person “subjects” another to the deprivation of a constitutional right, within the
 20 meaning of section 1983, if he does an affirmative act, participates in another’s
 21 affirmative acts, or omits to perform an act which he is legally required to do that causes
 22 the deprivation of which complaint is made.”). Critically, Plaintiff fails to further allege
 23 Kritzman actually knew Plaintiff had complained to Davis about Gomez’s “bizarre and
 24 crazy behavior,” *id.*, and fails to offer any additional facts from which the court might
 25 reasonably infer that Kritzman consciously disregarded any substantial risk posed by
 26 Gomez that was otherwise “obvious.” *Farmer*, 511 U.S. at 842; *Cortez*, 776 F.3d at 1050.

1 Thus, as currently pleaded, the Court finds Plaintiff's Eighth Amendment failure to
 2 protect claims against both Drs. Davis and Kritzman are merely "consistent with"
 3 possible liability, but, without further factual enhancement, are insufficient to "nudge
 4 [Plaintiff's] claim" of cruel and unusual punishment "across the line from conceivable to
 5 plausible." *Iqbal*, 556 U.S. at 678, 680 (citing *Twombly*, 550 U.S. at 557, 570).

6 Accordingly, the Court GRANTS Defendant Davis and Kritzman's Motion to
 7 Dismiss Plaintiff's Eighth Amendment failure to protect claims pursuant to FED. R. CIV.
 8 P. 12(b)(6).²

9 **IV. Defendants Brown and Mendez's Motion for Summary Judgment**

10 Next, Defendants Brown and Mendez seek summary judgment as to Plaintiff's
 11 Eighth Amendment failure to protect claims on grounds that he failed to exhaust his
 12 administrative remedies before filing suit as is required by 42 U.S.C. § 1997e(a) (Doc.
 13 No. 9).

14 **A. Legal Standards**

15 **1. Statutory Exhaustion Requirement**

16 Pursuant to the Prison Litigation Reform Act of 1995 ("PLRA"), "[n]o action shall
 17 be brought with respect to prison conditions under [42 U.S.C. § 1983], or any other
 18 Federal law, by a prisoner confined in any jail, prison, or other correctional facility until
 19 such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). This
 20 statutory exhaustion requirement applies to all inmate suits about prison life, *Porter v.*
 21

22
 23 ² Because the Court finds Plaintiff has failed to state an Eighth Amendment failure
 24 to protect claim against either Defendant Davis or Kritzman, it need not further decide
 25 whether they are entitled to qualified immunity. *See Saucier v. Katz*, 533 U.S. 194, 200
 26 (2001) ("If no constitutional right would have been violated were the allegations
 27 established, there is no necessity for further inquiries concerning qualified immunity.");
 28 *see also County of Sacramento v. Lewis*, 523 U.S. 833, 841 n.5 (1998) ("[T]he better
 approach to resolving cases in which the defense of qualified immunity is raised is to
 determine first whether the plaintiff has alleged the deprivation of a constitutional right at
 all.").

1 *Nussle*, 534 U.S. 516, 532 (2002) (quotation marks omitted), regardless of the relief
 2 sought by the prisoner or the relief offered by the process. *Booth v. Churner*, 532 U.S.
 3 731, 741 (2001).

4 “Proper exhaustion demands compliance with an agency’s deadlines and other
 5 critical procedural rules[.]” *Woodford v. Ngo*, 548 U.S. 81, 90 (2006). The Supreme
 6 Court has also cautioned against reading futility or other exceptions into the statutory
 7 exhaustion requirement. *See Booth*, 532 U.S. at 741 n.6. Moreover, because proper
 8 exhaustion is necessary, a prisoner cannot satisfy the PLRA exhaustion requirement by
 9 filing an untimely or otherwise procedurally defective administrative grievance or appeal.
 10 *See Woodford*, 548 U.S. at 90-93. Instead, “to properly exhaust administrative remedies
 11 prisoners ‘must complete the administrative review process in accordance with the
 12 applicable procedural rules,’[]-rules that are defined not by the PLRA, but by the prison
 13 grievance process itself.” *Jones v. Bock*, 549 U.S. 199, 218 (2007) (quoting *Woodford*,
 14 548 U.S. at 88). *See also Marella v Terhune*, 568 F.3d 1024, 1027 (9th Cir. 2009) (“The
 15 California prison system’s requirements ‘define the boundaries of proper exhaustion.’”) (quoting *Jones*, 549 U.S. at 218).

17 Because the failure to exhaust is an affirmative defense, Defendants bear the
 18 burden of raising and proving its absence. *Jones*, 549 U.S. at 216; *Albino v. Baca*, 747
 19 F.3d 1162, 1166 (9th Cir. 2014) (en banc). “In the rare event that a failure to exhaust is
 20 clear from the face of the complaint, a defendant may move for dismissal under Rule
 21 12(b)(6).” *Albino*, 747 F.3d at 1166. Otherwise, Defendants must produce evidence
 22 proving the Plaintiff’s failure to exhaust, and they are entitled to summary judgment
 23 under Rule 56 only if the undisputed evidence, viewed in the light most favorable
 24 Plaintiff, shows he failed to exhaust. *Id.*

25 **2. Rule 56 Summary Judgment**

26 Any party may move for summary judgment, and the Court must grant summary
 27 judgment if the movant shows that there is no genuine dispute as to any material fact and
 28 the movant is entitled to judgment as a matter of law. FED. R. CIV. P. 56(a) (quotation

marks omitted); *Albino*, 747 F.3d at 1166; *Washington Mut. Inc. v. U.S.*, 636 F.3d 1207, 1216 (9th Cir. 2011). Each party's position, whether a fact is disputed or undisputed, must be supported by: (1) citing to particular parts of materials in the record, including but not limited to depositions, documents, declarations, or discovery; or (2) showing that the materials cited do not establish the presence or absence of a genuine dispute or that the opposing party cannot produce admissible evidence to support the fact. FED. R. CIV. P. 56(c)(1) (quotation marks omitted). The Court may consider other materials in the record not cited to by the parties, although it is not required to do so. FED. R. CIV. P. 56(c)(3); *Carmen v. San Francisco Unified Sch. Dist.*, 237 F.3d 1026, 1031 (9th Cir. 2001); *accord Simmons v. Navajo Cnty., Ariz.*, 609 F.3d 1011, 1017 (9th Cir. 2010).

When Defendants seek summary judgment based on the Plaintiff's failure to exhaust specifically, they must first prove that there was an available administrative remedy and that Plaintiff did not exhaust that available remedy. *Williams v. Paramo*, 775 F.3d 1182, 1191 (9th Cir. 2015) (citing *Albino*, 747 F.3d at 1172) (quotation marks omitted). If they do, the burden of production then shifts to the Plaintiff "to come forward with evidence showing that there is something in his particular case that made the existing and generally available administrative remedies effectively unavailable to him." *Williams*, 775 F.3d at 1191; *see also McBride v. Lopez*, __ F.3d __, 2015 WL 3953483 at *1, 2 (9th Cir. June 30, 2015) (No. 12-17682) (citing "certain limited circumstances where the intervening actions or conduct by prison officials [may] render the inmate grievance procedure unavailable.").

"If the undisputed evidence viewed in the light most favorable to the prisoner shows a failure to exhaust, a defendant is entitled to summary judgment under Rule 56." *Albino*, 747 F.3d at 1166. However, "[i]f material facts are disputed, summary judgment should be denied, and the district judge rather than a jury should determine the facts." *Id.*

B. Defendants' Arguments

Brown and Mendez claim the California Department of Corrections and

Rehabilitation (“CDCR”) has established an administrative grievance procedure which was available to Plaintiff, and that he, in fact, did avail himself of that procedure by filing three separate administrative appeals referencing Gomez’s November 10, 2013 attack. Brown and Mendez seek summary judgment, however, because they claim none of these appeals are sufficient to show Plaintiff exhausted the Eighth Amendment failure to protect claims he now seeks to pursue. *See* Defs.’ Mem. of P&As in Supp. of Mot. for Summ. J. (Doc. No. 9-1) (hereafter “Defs.’ P&As”) at 15-18. Specifically, Brown and Mendez claim Plaintiff’s first two administrative appeals failed to put them on notice that he was complaining about Gomez’s cell assignment, and not merely seeking medical attention for the injuries he sustained. *Id.* at 15-17. Brown and Mendez further contend that while Plaintiff’s third appeal did include allegations related to the danger posed by Gomez’s cell assignment, it was not properly exhausted because it was untimely. *Id.* at 17-18.

C. Discussion

First, no party disputes that the CDCR provides inmates with an administrative remedy to address both “non-medical inmate grievances,” also known as Inmate/Parolee Appeals, which are initiated by filing a CDCR Form 602, *see* Decl. of R. Olson in Supp. of Defs.’ Mot. for Summ. J. (Doc. No. 9-3) (hereafter “Olson Decl.”) at 1, ¶ 1; CAL. CODE REGS., tit. 15 § 3084.2(a), and “medical, dental and mental health care issues,” also known as Patient/Inmate Health Care Appeals, which are initiated by filing a CDCR Form 602 HC. *See* Decl. of R. Robinson in Supp. of Defs.’ Mot. for Summ. J. (Doc. No. 9-6) (hereafter “Robinson Decl.”) at 2 ¶ 2; *Williams*, 775 F.3d at 1191. No party further disputes that appeals related to medical care are “handled under the same regulatory framework” as non-medical appeals, *see* Defs.’ P&As at 8, insofar as both are initially reviewed by either custody or medical staff at the institutional level, *see* Robinson Decl. ¶ 3; Olson Decl. ¶ 1; however, “third level” health care appeals are “processed by the Inmate Correspondence and Appeals Branch (ICAB)” and California Correctional Health

Care Services (CCHCS),³ while third level non-medical inmate appeals are heard by the CDCR's Office of Appeals in Sacramento. *See* Robinson Decl. at 1-2 ¶¶ 1-3; Olson Decl. at 1-2 ¶¶ 1-2.

In addition, no party disputes that an administrative appeal must be filed within thirty calendar days: (1) of the event or decision being appealed, (2) upon the inmate first having knowledge of the action or decision being appealed, or (3) upon receipt of an unsatisfactory departmental response to an appeal filed. *See* CAL. CODE REGS., tit. 15, § 3084.8(b)(1) (quotation marks omitted); *Vaden v. Summerhill*, 449 F.3d 1047, 1049 (9th Cir. 2006); *see also* Olson Decl. at 2-3 ¶¶ 2-4.

A California prisoner may appeal "any policy, decision, action, condition, or omission by the department or its staff that [he] can demonstrate as having a material adverse effect upon his . . . health, safety, or welfare." CAL CODE REGS., tit. 15 § 3084.1(a). Since January 28, 2011, and during the times alleged in Plaintiff's Complaint, Title 15 of the California Code of Regulations requires three formal levels of appeal review. *See* Olson Decl. at 2 ¶ 2.

Thus, in order to properly exhaust, a California prisoner must, within 30 calendar days of the decision or action being appealed, or "upon first having knowledge of the action or decision being appealed," CAL. CODE REGS., tit. 15 § 3084.8(b), "use a CDCR Form 602 (Rev. 08/09), Inmate/Parolee Appeal, to describe the specific issue under appeal and the relief requested." *Id.* § 3084.2(a). The CDCR Form 602 "shall be submitted to the appeals coordinator at the institution." *Id.* § 3084.2(c), § 3084.7(a). If the first level CDCR Form 602 appeal is "denied or not otherwise resolved to the appellant's satisfaction at the first level," *id.* § 3084.7(b), the prisoner must "within 30 calendar days

³ Health care appeals have been handled separately from non-medical appeals within the CDCR since August 1, 2008, as a result of a still-pending Northern District of California class action lawsuit regarding medical care standards throughout the State's prisons. *See* Robinson Decl., at 2 ¶ 2 (citing *Plata v. Brown*, et al., N. D. Cal. Civil Case No., 3:01-cv-01351-TEH (2001)).

1 . . . upon receiving [the] unsatisfactory departmental response,” *id.* § 3084.8(b)(3), seek a
 2 second level of administrative review, which is “conducted by the hiring authority or
 3 designee at a level no lower than Chief Deputy Warden, Deputy Regional Parole
 4 Administrator, or the equivalent.” *Id.* § 3084.7(b), (d)(2). “The third level is for review of
 5 appeals not resolved at the second level.” *Id.* § 3084.7(c). “The third level review
 6 constitutes the decision of the Secretary of the CDCR on an appeal, and shall be
 7 conducted by a designated representative under the supervision of the third level Appeals
 8 Chief or equivalent. The third level of review exhausts administrative remedies,” *id.*
 9 § 3084.7(d)(3), “unless otherwise stated.”¹ *Id.* § 3084.1(b); *see also* Olson Decl. ¶¶ 2-3;
 10 CDCR OP. MAN. § 541100.13 (“Because the appeal process provides for a systematic
 11 review of inmate and parolee grievances and is intended to afford a remedy at each level
 12 of review, administrative remedies shall not be considered exhausted until each required
 13 level of review has been completed.”).

14 Therefore, the only question in this case is whether Defendants Brown and Mendez
 15 have carried their burden under Rule 56 to show there is no material dispute as to whether
 16 Plaintiff exhausted the administrative remedies made available to him as to the failure to
 17 protect claims he now alleges against them before he filed suit as is required by CAL.
 18 CODE REGS., tit. 15 § 3084, et seq. *See* Compl. at 2-3; *Williams*, 775 F.3d at 1191.

19 **1. Defendants’ Evidence**

20 Defendants admit Plaintiff filed three administrative appeals specifically
 21 addressing Gomez’s November 10, 2103 attack, and have attached evidence of those
 22 appeals as documented in both the CCHCS’s health care appeals tracking database
 23 (HCARTS), and the CDCR’s Office of Appeals Inmate Appeals Tracking System
 24

25
 26 ¹ For example, “[a] second level of review shall constitute the department’s final action
 27 on appeals of disciplinary actions classified as ‘administrative’ as described in section
 28 3314, or minor disciplinary infractions documented on CDC Form 128-A (rev. 4-74),
 Custodial Counseling Chrono, pursuant to section 3312(a)(2), and shall exhaust
 administrative remedy on these matters.” CAL. CODE REGS., tit. 15 § 3084.7(b)(1).

(IATS). *See* Defs.’ P&As at 8; Olson Decl. at 3-4 & Exs. A & B; Robinson Decl. at 3-4 & Exs. A & B. The content, procedural histories, and outcomes of each of these appeals are summarized below.

a. RJD-HC-13049994 / RJD-A-13-3696

On November 16, 2013, six days after he was attacked by Gomez, Plaintiff filed a CDCR 602 Inmate/Parolee Appeal, which was originally logged as RJD-A-13-3696. *See* Decl. of D. VanBuren in Supp. of Defs.’ Mot. for Summ. J. (Doc. No. 9-5) (hereafter “VanBuren Decl.”) at 3 ¶ 5(a) & Ex. B at 22. In the section of this CDCR 602 Form in which he was asked to “state briefly the subject of your appeal,” Plaintiff wrote “personal injury.” *Id.* Ex. B at 22. In the following section A, when asked to “[e]xplain [his] issue,” and to use a CDCR 602-A if he required more space, Plaintiff described in great detail how he was attacked by Gomez on November 10, 2013, and how he was “caught of[f] guard,” when Gomez went “berserk” after he “politely” asked him to lower the volume on the TV. Plaintiff continued by listing his infirmities, describing the physical struggle, and explaining how “days before,” he had read a letter from Gomez’s mom that said, “Be sure to take your psy. meds.” *Id.* at 23. Plaintiff included allegations related to how, prior to the attack, he “went to see Dr. Davis & ... told him about [Gomez’s] behavior & his mom’s letter. Dr. Davis replied he [Gomez] had to go through his clinician D. Kritzman before he can dispense psych. meds.” Plaintiff then claimed he “followed up on this,” by “try[ing] to get [Gomez] his medication,” but it was “to[o] late,” and Gomez attacked him. *Id.*

In section B of his CDCR Form 602, entitled “Action requested,” Plaintiff continued to describe Gomez’s attack as a “one way fight” due to Plaintiff’s age, diabetes, hypertension, and Hep-C status. *Id.* at 22. On the attached CDCR 602-A, Plaintiff further reported that as a result of Gomez’s attack, his jaw and cartilage in his nose was broken, he could “only breathe through one nostril,” was experiencing pain while chewing, had a bruised arm and face, and believed a loose muscle or tendon was “just dangling.” *Id.* at 23. Plaintiff concluded by “requesting all that’s damaged be

1 repaired,” including “the diaphragm of [his] back where [his] ribs are.” *Id.* Finally, just
 2 above his signature, Plaintiff explained that no supporting documents were being attached
 3 to his CDCR Form 602 because he was waiting for his “medical report to arrive at
 4 medical records.” *Id.* at 22.

5 Plaintiff’s CDCR Form 602 Log No. RJD-A-13-3696 was “received” at the Inmate
 6 Appeals Office on November 21, 2013. *See* Olson Decl. at 4 ¶ 6(b). On November 22,
 7 2013, Plaintiff was issued a CDC Form 695⁴ at the first level of screening. *See* VanBuren
 8 Decl. at 2 ¶ 5(a) & Ex. B at 21. According to Inmate Appeals Coordinator Olson, because
 9 “the only relief requested was medical treatment for the injuries [he] sustained during the
 10 attack,” Olson Decl. at 4 ¶ 6(b), Plaintiff was notified that CDC Form 602 Log No. RJD-
 11 A-13-03696 was being “returned,” and he was “advised that this appeal issue should be
 12 submitted to the appropriate CDCR unit for review.” *Id.* However, the same November
 13 22, 2013 Form 695 also informed Plaintiff that his “appeal ha[d] been forwarded to
 14 health care staff” for “further processing and review,” *id.*; indeed, both Olson and Health
 15 Care Appeals Coordinator VanBuren admit Plaintiff’s appeal was ultimately “accepted
 16 for review,” “converted to a Health Care Appeal,” and re-assigned tracking No. RJD-HC-
 17 13049994 on November 25, 2013. *Id.*; *see also* VanBuren Decl. at 3 ¶ 5(a).

18 On either December 9, 2013, or December 22, 2013, RJD-HC-13049994 was
 19 partially granted at the second level of review, and later denied at the third level of
 20

21 ⁴ Section 3084.5 of Title 15 of the California Code of Regulations, entitled “Screening
 22 and Managing Appeals,” provides that “prior to acceptance and assignment for review,”
 23 the institution’s appeals coordinator, or a “delegated staff member under the direct
 24 oversight of the coordinator shall screen all appeals.” CAL. CODE REGS., tit. 15
 25 § 3084.5(b)(1) (eff. Jan. 2015). “When an appeal is not accepted, the inmate or parolee
 26 shall be notified of the specific reason(s) for the rejection or cancellation of the appeal and
 27 the correction(s) needed for the rejected appeal to be accepted.” *Id.* § 3084.5(b)(3). Chapter
 28 5 of the CDCR’s OPERATIONS MANUAL further provides that “[w]hen it is determined that
 an appeal will not be accepted[,] an Inmate/Parolee Screening Form, CDC Form 695 . . .
 shall be completed, attached to the CDCR Form 602 and returned to the inmate or parolee.”
 CDCR OP. MAN., § 54100.10 (eff. Jan. 1, 2015).

1 review on February 26, 2014. *See* Van Buren Decl. at 3 ¶ 5(a) & Ex. B at 18; *see also*
 2 Robinson Decl. at 3 ¶ 6(b) & Ex. B; Pl.’s Supp. Doc. in Opp’n (Doc. No. 29) at 26.

3 **b. RJD-HC-13050039**

4 On November 24, 2013, approximately two weeks after Gomez’s attack, and just
 5 two days after he was issued the CDC Form 695 in relation to Log No. RJD-A-13-3696,
 6 Plaintiff filed a separate Patient/Inmate Health Care Appeal on a CDCR 602 HC Form,
 7 which was assigned Log No. RJD-HC-13050039. VanBuren Decl., Ex. C at 26. In this
 8 appeal, Plaintiff stated that the “subject/purpose of [his] appeal” was “[t]o follow up on
 9 injuries [he] sustained [i]n a beating,” repeated the details of Gomez’s November 10,
 10 2013 attack, and explained how his age and medical condition prevented him from
 11 “defend[ing] [him]self.” *Id.*, Ex. C at 16, 28. Plaintiff further claimed that while someone
 12 in the “hospital & the prison clinic” indicated after the attack that there would be a
 13 “medical follow up,” and he had since “complained various times to the nurse & doctor,”
 14 he still “want[ed] to talk to medical,” because he believed he had a “brain concussion”
 15 which was affecting his memory, eyesight, and hearing. *Id.* at 28. As he did in CDCR
 16 Form 602 Log No. RJD-A-13-3696, Plaintiff also reported to have “talked to Dr. Davis
 17 concerning [Gomez’s] meds & bizarre behavior” before the attack, but claimed Gomez
 18 was “moved back with [him] despite [his] warning to CO Mendoza.”⁵ *Id.*

19 Log No. RJD-HC-13050039, like Log No. RJD-HC-13049994, was partially
 20 granted at the second level of review on December 22, 2013, and later denied at the third
 21

22
 23 ⁵ Plaintiff’s Complaint does not name any Correctional Officer named Mendoza as a party
 24 to this action; nor does he claim that by referring to Mendoza, he intended to implicate
 25 Defendant Mendez instead. *See* CAL. CODE REGS., tit. 15 § 3084.2(a)(3) (“To assist in the
 26 identification of staff members, the inmate or parolee shall include the staff member’s last
 27 name, first initial, title or position, if known, and the dates of the staff member’s
 28 involvement in the issue under appeal. If the inmate . . . does not have the requested
 identifying information about the staff member(s), he or she shall provide any other
 available information that would assist the appeals coordinator in making a reasonable
 attempt to identify the staff member(s) in question.”).

1 level of review on February 26, 2014. VanBuren Decl., at 3 ¶ 5(b) & Ex. C at 30-32; *see*
 2 *also* Robinson Decl. at 3 ¶ 6(c); Pl.'s Supp. Doc. in Opp'n (Doc. No. 29) at 25.

3 **c. RJD-A-13-04021**

4 Finally, on December 20, 2013, approximately forty days after Gomez's November
 5 10, 2013 attack, Plaintiff filed a CDCR 602 Inmate/Parolee Appeal, which was assigned
 6 Log No. RJD-A-13-04021. *See* Olson Decl., at 3 ¶ 6(a) & Ex. A at 8-10. This time, when
 7 asked to "state briefly the subject of [his] appeal," Plaintiff wrote "reckless behavior."
 8 *Id.*, Ex. A at 8. In Section A of the CDCR Form 602, and on the attached CDCR Form
 9 602-A, in which he was asked to "explain [his] issue," Plaintiff again claimed to have
 10 been "viciously attacked" by Gomez on November 10, 2013. But this time, in addition to
 11 mentioning both Drs. Kritzman and Davis's alleged roles in either failing to medicate
 12 Gomez or somehow prevent the attack, Plaintiff also identified Defendants Mendez and
 13 Brown, and claimed "CO Mendez" was at fault for "plac[ing] Gomez twice with [him],"
 14 and Brown was responsible for "OK[ing] the move." *Id.* at 10. Plaintiff then added
 15 complaints of "never receiv[ing] some prescription medication, and endur[ing] approx. 14
 16 days of excruciating pain," and questioned, "Why was a demented predator placed with a
 17 sick old man like myself?" *Id.* Finally, when asked what action he requested, Plaintiff
 18 wrote: "It would be nice if everybody involved would admit their mistakes & not pass the
 19 blame to somebody else." *Id.*

20 While Appeals Coordinator Olson admits that RJD-A-13-04021 *did* include claims
 21 that Defendants Mendez, Brown, Kritzman, and Davis "failed to protect him from vicious
 22 attack by his cellmate," and that "his cellmate was moved to his cell with no regard to his
 23 safety," Olson Decl. at 3 ¶ 6(a), this appeal was "screened out/cancelled" at the first level
 24 of administrative review on December 24, 2013, "due to loss of time constraints," and
 25 pursuant to CAL. CODE REGS., tit. 15, § 3084.6(c)(4). *Id.* at 3-4. ¶ 6(a) & Ex. A at 6. R.
 26 Briggs, the Acting Chief of the CDCR's Office of Appeals, further attests that a search of
 27 the IATS database failed to show that Log No. RJD-A-13-04021, or any appeal filed by
 28 Plaintiff, which included allegations that Brown or Mendez had failed to protect him

1 from Gomez's November 10, 2013 attack, had ever been accepted for processing at the
 2 third level of administrative review. *See* Decl. of R. Briggs in Supp. of Defs.' Mot. for
 3 Summ. J (Doc. No. 9-4) (hereafter "Briggs Decl.") at 4 ¶ 8.

4 **2. Plaintiff's Rebuttal Evidence**

5 In opposition to Defendant Brown and Mendez's Motion, and in response to their
 6 evidence, Plaintiff filed hundreds of pages of his medical and mental health records. But
 7 he does not allege he was denied adequate medical care in his Complaint; therefore these
 8 records are not relevant to show that he exhausted his Eighth Amendment failure to
 9 protect claims. *See* Doc. Nos. 14, 18, 20, 29. Buried within these submissions, however,
 10 Plaintiff also makes further factual allegations as to his former cellmate Gomez's
 11 dangerous proclivities, and he includes copies of the same three administrative appeals
 12 Defendants Brown and Mendez offer as proof of his failure to exhaust. *See* Doc. No. 29,
 13 at 2-3, 23-26.

14 In fact, Plaintiff appears to concede that he failed to timely exhaust his failure to
 15 protect claims as to Brown and Mendez, *see id.* at 31, but argues he was in "excruciating
 16 pain" for the "30 to 40 days" following Gomez's attack, that he "tried to fill out the 602
 17 appeal forms [and] to send [them] in before the 30 day time limit," but was "not in his
 18 right mind" and "not operating within his faculties" at the time. *Id.* at 34; *see also* Doc.
 19 No. 14 at 12. By the time Plaintiff claims he submitted his third administrative appeal via
 20 a CDCR Form 602 (Log No. RJD-A-13-04021), this time specifically mentioning both
 21 Brown and Mendez's "reckless behavior" in "placing Gomez" in his cell on December
 22 20, 2013, he acknowledges it was "to[o] late." *See* Doc. No. 29 at 31; *see also* Olson
 23 Decl., Ex. A at 8-10.

24 **3. Defendants' Reply**

25 In Reply, Defendants Brown and Mendez contend Plaintiff's "allegations that he
 26 was in pain or not in his right mind are not sufficient to excuse compliance with the
 27 exhaustion requirement," and are belied by other evidence which shows he was able to
 28

1 timely file three⁶ separate administrative appeals “which discussed the attack and
 2 requested additional medical care,” but which nevertheless failed to mention Brown and
 3 Mendez’s failures to protect him from Gomez’s November 10, 2013 attack. *See* Defs.’
 4 Reply (Doc. No. 16) at 3-4.

5 **4. Analysis**

6 Based on the evidence presented, the Court finds no genuine material dispute exists
 7 as to whether Plaintiff has properly exhausted all available administrative remedies as to
 8 his Eighth Amendment failure to protect claims against Defendants Brown and Mendez,
 9 and that therefore Brown and Mendez are entitled to summary judgment based on
 10 Plaintiff’s failure to comply with 42 U.S.C. § 1997e(a). *See Albino*, 747 F.3d at 1166
 11 (noting that if “undisputed evidence viewed in the light most favorable to the prisoner
 12 shows a failure to exhaust, a defendant is entitled to summary judgment under Rule 56.”).

13 First, Brown and Mendez have carried their burden of production by submitting
 14 sufficient evidence which shows that neither of the administrative appeals Plaintiff *timely*
 15 filed and properly exhausted through the third and final level of administrative review
 16 following Gomez’s November 10, 2013 attack (Log No. RJD-HC-1304994 or Log No.
 17 RJD-HC-13050039), adequately put either of them on notice that he was seeking to
 18 complain about their failure to protect him from Gomez, and not instead seeking medical
 19 attention for the injuries he sustained during the attack. An appeal generally “suffices to
 20 exhaust a claim if it puts the prison on adequate notice of the problem for which the
 21 prisoner seeks redress.” *Sapp v. Kimbrell*, 623 F.3d 813, 822-23 (9th Cir. 2010); *see also*
 22 *Jones*, 549 U.S. at 218 (noting that the level of detail in an administrative grievance
 23 necessary to properly exhaust a claim is determined by the prison’s applicable grievance
 24 procedures); *Woodford*, 548 U.S. at 84, 90-1 (noting that to “properly” exhaust, prisoner
 25

26
 27 ⁶ In addition to RJD-HC-1304994, and RJD-HC-13050039, Defendants claim that on
 28 December 10, 2013, Plaintiff timely filed a third appeal, Log No. RJD-HC-13050094,
 requesting orthopedic shoes. *See* Defs.’ Reply at 4; VanBuren Decl., Ex. A at 9.

1 must “comply with an agency’s deadlines and other critical procedural rules.”). In this
 2 case, the record shows that those “critical procedural rules” required that Plaintiff’s
 3 CDCR 602 appeal forms “describe the specific issue under appeal and the relief
 4 requested,” *see* CAL. CODE REGS., tit. 15, § 3084.2 (a), prohibited him from “combining
 5 unrelated issues on a single appeal form,” *id.* § 3084.2(a)(1), and mandated that he “list
 6 all staff member(s) involved” and “describe their involvement in the issue.” *Id.*,
 7 § 3084.2(a)(3)⁷; *see also Rhodes v. Robinson*, 621 F.3d 1002, 1005 (9th Cir. 2010) (“[A]
 8 prisoner must exhaust his administrative remedies *for the claims contained within his*
 9 *complaint* before that complaint is tendered to the district court.”) (emphasis added).

10 The primary purpose of a grievance is to notify the prison of a problem. *Griffin*,
 11 557 F.3d at 1120 (quotation marks and citations omitted); *accord Wilkerson v. Wheeler*,
 12 772 F.3d 834, 839 (9th Cir. 2014); *Akhtar v. Mesa*, 698 F.3d 1202, 1211 (9th Cir. 2012).
 13 Thus, Plaintiff’s CDCR 602 Log No. RJD-HC-1304994 or Log No. RJD-HC-13050039
 14 would suffice to satisfy § 1997e(a)’s exhaustion requirement *if* Defendants Brown and
 15 Mendez were included in a list of staff members involved, if either of these appeals
 16 “describe[d] [Brown and Mendez’s] involvement in the issue under appeal,” and if he
 17 mentioned or somehow directed his allegations of wrongdoing on their failure to protect
 18 him from Gomez, and did not, instead, focus his grievances on his medical infirmities
 19 and the injuries he sustained and make specific demands for immediate medical relief.
 20 *See* CAL. CODE REGS. tit. 15, § 3084.2. Because the undisputed evidence in the record
 21 shows instead that Plaintiff’s CDCR 602 Log No. RJD-HC-1304994 and Log No. RJD-
 22 HC-13050039 lacked even a modicum of detail involving their purported roles in failing
 23 to protect him, Defendants Brown and Mendez could not have reasonably been alerted to
 24

25
 26 ⁷ Before January 28, 2011, the CDCR’s regulations merely required prisoner to include
 27 a description of the problem and the action requested on the CDCR Form 602. *See*
 28 § 3084.2(a) (2010); *Sapp*, 623 F.3d at 824 (finding that at the time Sapp filed his grievance,
 15 CAL. CODE REGS., § 3084.2 did not require him to identify prison officials by name in
 order to exhaust).

1 the nature of the wrong for which Plaintiff now seeks redress against them. *See Sapp*, 623
 2 F.3d at 824; *Akhtar*, 698 F.3d at 1211; *McCollum v. Cal. Dept. of Corr. and*
 3 *Rehabilitation*, 647 F.3d 870, 876 (9th Cir. 2011) (finding Wiccan prisoner’s grievance
 4 alleging religious discrimination in the form of unequal access to worship places and
 5 sacred items insufficient to put prison officials on notice of Plaintiff’s separate legal
 6 challenge to the prison’s failure to establish a paid Wiccan chaplaincy).

7 Second, Defendants have also proffered sufficient evidence related to Plaintiff’s
 8 CDCR Form 602 Log No. RJD-A-13-04021 to demonstrate that while it *was* sufficient to
 9 put Brown and Mendez on notice of Plaintiff’s failure to protect claims against them,
 10 there is nevertheless no genuine dispute as to whether this appeal was “properly”
 11 exhausted. This is because the record shows, and Plaintiff admits, this appeal was
 12 rejected as untimely. *See* CAL. CODE REGS., tit. 15 § 3084.8(b) (requiring inmate or
 13 parolee to “submit the appeal within 30 calendar days of: (1) [t]he occurrence of the
 14 event or decision being appealed, or; (2) [u]pon first having knowledge of the action or
 15 decision being appealed, or; (3) [u]pon receiving an unsatisfactory departmental response
 16 to an appeal filed.”); CDCR OP. MAN., § 54100.13 (“Cancellation or rejection decisions
 17 . . . do not exhaust the administrative remedies available.”); Olson Decl. at 3 ¶ 6(a) & Ex.
 18 A at 6-11; Pl.’s Supp. Opp’n (Doc. No. 29) at 31; *Woodford*, 548 U.S. at 90 (“Proper
 19 exhaustion demands compliance with an agency’s deadlines.”).

20 Thus, because Defendants Brown and Mendez have carried their burden to show
 21 both that “that there was an available administrative remedy, and that [Plaintiff] did not
 22 exhaust that available remedy” as to the failure to protect claims alleged against them,
 23 *Albino*, 747 F.3d at 1172, the burden then shifts to Plaintiff to “come forward with
 24 evidence” to show “that there is something in his particular case that made the existing
 25 and generally available administrative remedies effectively unavailable to him.” *Id.* at
 26 1172; *Williams*, 775 F.3d at 1191.

27 As mentioned above, Plaintiff has submitted voluminous copies of his medical
 28 records in Opposition to Defendant Brown and Mendez’s Motion for Summary

Judgment, and has included copies of the same CDCR inmate appeals they offer as proof of his *failure* to exhaust. *See* Doc. Nos. 14, 18, 20, 29. He does not expressly claim that administrative remedies were not available to him; but he does argue he should be excused from 42 U.S.C. § 1997e(a)'s exhaustion requirement because he "must not have been in [his] right mind," when he "filed numerous 602's medical and regular appeals" during the "30-40 days" after Gomez's attack due to a "lot of excruciating pain," and because he was "in duress." Plaintiff further admits, however, that "[i]t was not that [he] couldn't file 602s," because his "right arm was good enough to write," but instead it was because he just "could not think straight," and "fe[lt] like a zombie" at the time. *See* Pl.'s Opp'n, Doc. No. 14 at 12; Supp. Opp'n, Doc. No. 20, at 4.

"To be available, a remedy must be available as a practical matter; it must be capable of use; at hand." *Williams*, 775 F.3d at 1191 (internal quotations and citations omitted). A prisoner may demonstrate that an administrative remedy was "effectively unavailable" to him by "showing that the local remedies were ineffective, unobtainable, unduly prolonged, inadequate, or obviously futile." *Id.* (quoting *Hilao v. Estate of Marcos*, 103 F.3d 767, 778 n.5 (9th Cir. 1996)); *Albino*, 747 F.3d at 1172. For example, Plaintiff may meet his burden of production by offering evidence which shows prison officials "thwarted" him by "inform[ing] [him] that he c[ould not] file a grievance," *Williams*, 775 F.3d at 1192 (citing *Brown v. Valoff*, 422 F.3d 926, 937 (9th Cir. 2005)), threatened him with retaliation if he filed one, *see McBride*, __ F.3d __, 2015 WL 3953483 at *3-4, improperly rejected or "screened out" his grievance, *see, e.g., Sapp*, 623 F.3d at 822-823; made a "mistake" by erroneously requiring additional paperwork which caused him to miss a filing deadline, *see e.g., Nunez v. Duncan*, 591 F.3d 1217, 1226 (9th Cir. 2010); failed to provide him with either grievance forms or information about the grievance procedure, despite his complaints or requests, *see e.g., Albino*, 747 F.3d at 1177; or by pointing to other circumstances, like hospitalization, segregation, or transfer to another facility, which precluded any meaningful opportunity to timely comply. *See Marella*, 568 F.3d at 1027-28 (remanding exhaustion issue to district court where record

unclear as to whether prisoner injured in a knife attack at the hands of another prisoner had access to the necessary grievance forms or the ability to timely file an appeal due to his stay in the hospital, prison infirmary, and subsequent administrative segregation); *see also O'Neal v. Stewart*, 2014 WL 3818117 at *2 (C.D. Cal. 2014) (collecting cases suggesting an inmate's transfer from one institution to another immediately following the incident giving rise to his claim could render administrative remedies unavailable).

Here, however, Plaintiff has failed to "come forward with evidence" sufficient to rebut the ample evidence offered by Defendants Brown and Mendez which, even when viewed in the light most favorable to Plaintiff, shows both the availability of California's prison administrative procedures, and his failure to properly exhaust those procedures. *Albino*, 747 F.3d at 1172, 1174.⁸ Specifically, Plaintiff has failed to show that prison officials thwarted his access to the grievance procedure, threatened or intimidated him in any way, or were mistaken when they rejected RJD Log. No. 13-A-0421 as untimely. *See Williams*, 775 F.3d at 1191-92; *Nunez*, 591 F.3d at 1226; *McBride*, ___ F.3d at ___, 2015 WL 3953483 at *2-3. Moreover, while Plaintiff suggests his failure to properly include his Eighth Amendment failure to protect claims against Brown and Mendez in either Log No. RJD-HC-1304994 or Log No. RJD-HC-13050039 was due to his confusion, medication, or pain, *see* Pl.'s Opp'n, Doc. No. 14 at 12, he has not pointed to any

⁸ While Plaintiff's Complaint (Doc. No. 1), and the documents he has submitted in Opposition to Defendant Brown and Mendez's Motion for Summary Judgement (Doc. Nos. 14, 18, 20, 29), contain factual claims related to his ability to exhaust which are based on his personal knowledge, none are verified under penalty of perjury pursuant to 28 U.S.C. § 1746. "A verified complaint may be used as an opposing affidavit under Rule 56." *Schroeder v. McDonald*, 55 F.3d 454, 460 (9th Cir. 1995) (citing *McElyea v. Babbitt*, 833 F.2d 196, 197-98 (9th Cir. 1987)). In *Williams*, the Ninth Circuit considered allegations raised in a prisoner's complaint related to exhaustion as an affidavit sufficient to show that administrative remedies were "not available" because they were made under penalty of perjury. 775 F.3d at 1192 & n.11. Here, Plaintiff's allegations are not sworn, but even if they were, they would still be insufficient to meet his burden of production as to exhaustion, because unlike in *Williams*, Plaintiff does not claim to have been "thwarted from filing a grievance." *Id.* (citing *Brown*, 422 F.3d at 937).

evidence which shows that his mental or physical state, or any other condition of his confinement outside of his control, precluded him from timely or meaningfully seeking administrative review of either Brown or Mendez's purported role in Gomez's attack. *Cf. Marella*, 568 F.3d at 1027-28; *O'Neal*, 2014 WL 3818117 at *2. In fact, the undisputed evidence before this Court shows that Plaintiff was indeed able to properly exhaust claims related to the medical care and follow-up treatment he received following Gomez's attack when he timely filed Log No. RJD-HC-1304994 and Log No. RJD-HC-13050039, despite his allegedly compromised physical and mental condition at the time.

Therefore, the Court finds Defendant Brown and Mendez are entitled to summary judgment as to Plaintiff's failure to protect claims based on his failure to exhaust those claims prior to filing suit pursuant to 42 U.S.C. § 1997e(a) and FED. R. CIV. P. 56(a).

V. Conclusion and Order

Based on the foregoing, the Court:

1) **GRANTS** Defendant Davis and Kritzman's Motion to Dismiss pursuant to FED. R. CIV. P. 12(b)(6) (Doc. No. 10);

2) **GRANTS** Defendant Brown and Mendez's Motion for Summary Judgment based on Plaintiff's failure to exhaust administrative remedies as required by 42 U.S.C. § 1997e(a) pursuant to FED. R. CIV. P. 56 (Doc. No. 9);

3) **FINDS** no just reason for delay and therefore **DIRECTS** the Clerk to enter a partial judgment on behalf of Defendants Brown and Mendez pursuant to FED. R. CIV. P. 50(b); and

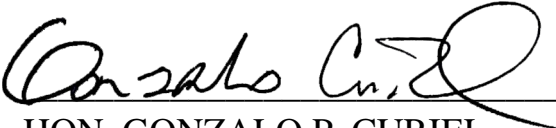
4) **GRANTS** Plaintiff forty-five (45) days leave from the date of this Order in which to file an Amended Complaint which addresses the deficiencies of pleading his failure to protect claims against Defendants Davis and Kritzman only. Plaintiff is cautioned that his Amended Complaint must be complete in itself without reference to his original complaint. *See* S.D. CAL. CIVLR 15.1; *Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1546 (9th Cir. 1989) ("[A]n amended pleading supersedes the original."); *Lacey v. Maricopa Cnty.*, 693 F.3d 896, 928 (9th Cir. 2012) (noting that

1 claims dismissed with leave to amend which are not re-alleged in an amended pleading
2 may be “considered waived if not replied.”).

3 Should Plaintiff elect *not* to proceed by filing an Amended Complaint against
4 Defendants Davis and Krittman within 45 days, the Court will enter a final Order of
5 dismissal of the remainder of this civil action based on his failure to state an Eighth
6 Amendment failure to protect claim against them, and his failure to prosecute in
7 compliance with a Court Order requiring amendment. *See Ferdik v. Bonzelet*, 963 F.2d
8 1258, 1260-61 (9th Cir. 1992) (dismissal for failure to prosecute permitted if plaintiff
9 fails to respond to a court’s order requiring amendment of complaint); *Lira v. Herrera*,
10 427 F.3d 1164, 1169 (9th Cir. 2005) (“If a plaintiff does not take advantage of the
11 opportunity to fix his complaint, a district court may convert the dismissal of the
12 complaint into dismissal of the entire action.”).

13 **IT IS SO ORDERED.**

14
15 Dated: August 6, 2015


HON. GONZALO P. CURIEL
United States District Judge